Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

MAGNOLIA VENTURE CAPITAL CORPORATION,
Petitioner,

v.

MISSISSIPPI DEPARTMENT OF ECONOMIC AND COMMUNITY DEVELOPMENT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PATRICK H. SCANLON
Counsel of Record

JENNIFER P. BURKES
SCANLON, SESSUMS, PARKER
& DALLAS
1650 MIRROR LAKE PLAZA
2829 LAKELAND DRIVE
JACKSON, MS 39208
(601) 933-2040

Attorneys for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

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QUESTIONS PRESENTED FOR REVIEW

1. Does a federal court lose its exclusive jurisdiction over a bankrupt debtor's estate where

   (i) the debtor brings a turnover proceeding in bankruptcy court against the custodian of its property;

   (ii) the State intervenes in the bankruptcy court proceeding to claim an interest in such property, but the debtor's property is not in the possession of the State; and

   (iii) the State claims Eleventh Amendment immunity and moves to dismiss the bankruptcy court proceeding?

2. Should the holding of California v. Deep Sea Research, Inc., --U.S.--, 118 S. Ct. 1464, 149 L. Ed. 2d 626 (1998), that the Eleventh Amendment does not bar the exclusive jurisdiction of a federal court over an in rem admiralty action where the *res* is not within the State's possession, be extended to bankruptcy proceedings?

PARTIES TO THE PROCEEDING

Petitioner

Magnolia Venture Capital Corporation

Respondent

Mississippi Department of Economic and Community Development

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OPINIONS BELOW

The panel opinion issued by the lower court is reported at 151 F.3d 439 (5th Cir. 1998) and may be found at App. 3a. The district court opinion is reported at 218 B.R. 843 (S.D. Miss. 1997), and may be found at App. 20a. The lower court denied the Petitioner's Request for Rehearing, and the denial may be found at App. 1a.

JURISDICTION

The judgment sought to be reviewed is a judgment of the United States Court of Appeals for the Fifth Circuit entered on August 28, 1998. The Petition for Rehearing was denied on October 2, 1998. This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT XI, UNITED STATES CONSTITUTION

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

28 U.S.C. § 1334(e)

The district court in which a case under Title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

STATEMENT OF THE CASE

The Petitioner, Magnolia Venture Capital Corporation ("Magnolia Venture"), is a for-profit corporation that is currently a bankrupt debtor-in-possession under Chapter 11 in the United States District Court for the Southern District of Mississippi. Magnolia Venture was organized pursuant to the Mississippi Venture Capital Act of 1994, codified as Mississippi Code Annotated §§ 57-77-1 through 57-77-39 (the "Act"). Pursuant to the Act, the Mississippi Department of Economic and Community Development (the "Department") caused the incorporation of Magnolia Capital Corporation ("MCC"), a non-profit corporation whose purpose was to be the sole shareholder of Magnolia Venture. The Department and MCC entered into a Loan Agreement, and the Department loaned MCC $20,000,000.00 as a non-recourse loan. These funds had been raised by the State Bond Commission's sale of General Obligation Bonds. MCC subsequently deposited with the Mississippi State Treasurer $6,176,600.00 of the loaned funds, which the State Treasurer invested in zero coupon bonds to mature in fifteen (15) years. Magnolia Venture was not a party to the Loan Agreement.

MCC subsequently capitalized and became the sole shareholder of Magnolia Venture by investing $13,595,000.00 in Magnolia Venture as an equity contribution. In addition, Magnolia Venture obtained a private investment in the amount of $5,000,000.00. Magnolia Venture officially began its operations on January 1, 1996.

On May 9, 1997, Magnolia Venture filed a Voluntary Petition for bankruptcy under Chapter 11. At this time, Magnolia Venture's property consisted of approximately $2.5 million in assets, which were managed and held by Prudential Security, Inc. ("Prudential"). On May 12, 1997, Magnolia

Venture notified the Department of the filing of the bankruptcy petition and requested that the Department rescind a notice it had previously given to Prudential demanding that all of Magnolia Venture's securities be delivered to the Department. The Department failed to rescind such notice to Prudential, and Prudential froze Magnolia Venture's assets.

On June 4, 1997, Magnolia Venture, as debtor in possession, filed an Adversary Complaint in the United States Bankruptcy Court against Prudential. The Complaint was for a turnover of assets from a custodian pursuant to 11 U.S.C. § 542. After Magnolia Venture filed the Adversary Complaint against Prudential, the Department moved to intervene. Over Magnolia Venture's objection, the bankruptcy court granted the Department's motion and advised the Department that they were intervening for all purposes. Upon intervention, the Department filed a motion to dismiss based on Eleventh Amendment immunity.

The district court denied the Department's motion to dismiss, holding that the Department had consented to federal jurisdiction and/or waived any claim it may have to Eleventh Amendment immunity. The Department appealed this decision to the United States Court of Appeals for the Fifth Circuit, which held that the Department lacked specific, expressed authorization to waive Eleventh Amendment immunity. The Fifth Circuit therefore reversed and remanded the case.

Although Magnolia Venture is a private, for-profit corporation that sought protection in federal court under Chapter 11, under the Fifth Circuit ruling the bankruptcy court lost its exclusive jurisdiction over the estate merely because the Department claimed a questionable interest in the debtor's assets, assets which are not in the State's possession.

REASONS FOR GRANTING THE WRIT

A. This case presents an important question of Constitutional law that has not, but should be, settled by this Court.

This Court should grant certiorari to resolve the question of whether a State can destroy a federal court's exclusive jurisdiction over a bankrupt debtor's estate by claiming an interest in property of the debtor not in the State's possession, intervening in an adversary proceeding in bankruptcy court, asserting Eleventh Amendment immunity, and thereby requiring disputes about the bankruptcy estate to be adjudicated in state court.

Earlier this year this Court held in California v. Deep Sea Research, Inc., -- U.S. --, 118 S. Ct. 1464, 149 L. Ed. 2d 626 (1998), that the Eleventh Amendment did not bar the federal court's jurisdiction over an in rem admiralty proceeding where the *res* was not within the State's possession. In Deep Sea, the State entered an appearance in the proceeding for the limited purpose of filing a motion to dismiss the in rem proceeding. The State alleged that it possessed title to the vessel, and therefore the in rem action was an action against the State in violation of the Eleventh Amendment. Id. at 1467. This Court observed that the federal courts have a "unique role in admiralty cases," but acknowledged that federal jurisdiction is constrained by the Eleventh Amendment. Id. at 1470. This Court, however, made a key distinction in Deep Sea: the *res* to which the plaintiff asserted rights in the admiralty in rem proceeding *was not in the possession of the State*. Id. at 1471. The Court therefore held that the Eleventh Amendment did not bar the proceeding, even though the State claimed an interest in the *res*. Id.

The facts of Deep Sea are strikingly similar to those before the Court in this case. The *res* at issue is Magnolia Venture's bankruptcy estate, a *res* neither in the actual or constructive possession of the State. Magnolia Venture filed for bankruptcy and, as debtor in possession, filed an adversary proceeding against Prudential for a turn-over of its assets. The State then sought to intervene in the proceeding for the sole purpose of claiming an interest in the *res* and seeking to have the proceeding dismissed as violative of the Eleventh Amendment. Unlike Deep Sea, however, in this case the State has prevailed and, by merely claiming a questionable interest in the debtor's *res* that is not in the State's possession, has destroyed the federal court's exclusive jurisdiction over the debtor's estate.

This Court should grant certiorari in this case to determine whether the holding of Deep Sea should be extended to bankruptcy and not limited to admiralty cases.

At Deep Sea's oral argument before this Court, several Justices "asked probing questions about the possible effect on bankruptcy cases of a decision" in Deep Sea. Mark Browning, *A Magic Bullet to Beat Seminole?*, Am. Bankr. Inst. J., Feb. 1998, at 10. This question merits attention from this Court.

This Court has long recognized the unique role of the federal courts in bankruptcy proceedings. This Court has previously stated that the "filing of the petition is a caveat to all the world and in effect an attachment and injunction." Gross v. Irving Trust Co., 289 U.S. 342, 344, 53 S. Ct. 605, 77 L. Ed. 1243 (1933). In addition, the federal courts possess "supreme power in respect of bankruptcies," and all parties must submit to its power because "otherwise, orderly and expeditious proceedings would be impossible and a

fundamental purpose of the Bankruptcy Act would be frustrated." New York v. Irving Trust Co., 288 U.S. 329, 333, 53 S. Ct. 389, 77 L. Ed. 815 (1933). Furthermore, the "jurisdiction in bankruptcy is made exclusive in the interest of the due administration of the estate," and "the bankruptcy court has exclusive jurisdiction to deal with the property of the bankrupt estate." Isaacs v. Hobbs Tie & Timber Co., 282 U.S. 734, 737-39, 51 S. Ct. 270, 75 L. Ed. 645 (1931).

In this case, the Fifth Circuit has ruled that the exclusive jurisdiction of the federal courts over the bankrupt debtor's estate is destroyed when the State claims even a questionable interest in the debtor's property, *even when* the property is not within the State's possession. This is an extremely important question of federal interest left unresolved by Deep Sea, but which should now be resolved by this Court. For this reason, the Petitioner's petition for writ of certiorari should be granted.

B. The decision of the Fifth Circuit Court of Appeals is in conflict with decisions of other federal courts of appeal.

This Court should also grant a writ of certiorari in this case because the decision of the Fifth Circuit conflicts with decisions of other courts of appeals. In Sea Services of the Keys, Inc. v. Florida, 156 F.3d 1151, 1152 (11th Cir. 1998), the Eleventh Circuit found that the State did not have lawful possession of the *res*, and therefore the State could not invoke the protection of the Eleventh Amendment. In Bouchard Trans. Co. v. Updegraff, 147 F.3d 1344, 1349 (11th Cir. 1998), the Eleventh Circuit found that the State did not have possession of the disputed *res*, and therefore the State was not entitled to Eleventh Amendment immunity. Updegraff, although an admiralty case, was not an in rem proceeding;

however, the Eleventh Circuit recognized it to be "sufficiently analogous for Deep Sea to compel the conclusion that [the State] is not entitled to sovereign immunity." Id.

The decision of the Fifth Circuit is in conflict with these cases. While the Eleventh Circuit has recognized that Deep Sea should be extended to proceedings other than in rem cases, and that the State's mere claim to property not in its possession does not warrant the protection of the Eleventh Amendment, the Fifth Circuit has held the State can destroy bankruptcy jurisdiction over a debtor's estate by merely claiming an interest (no matter how questionable) to some part of the debtor's property - - even if that property is not within the State's possession. This conflict between the Circuit Courts of Appeals should be resolved by this Court.

CONCLUSION

For these reasons, the Petitioner requests that this Court grant certiorari.

Respectfully submitted this the 30th day of December, 1998.

Magnolia Venture Capital Corporation, Plaintiff/Petitioner

/s/_____
Patrick H. Scanlon
Jennifer P. Burkes
Scanlon, Sessums, Parker & Dallas
1650 Mirror Lake Plaza
2829 Lakeland Drive
Jackson, MS 39208
(601) 933-2040

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 97-60835

MAGNOLIA VENTURE CAPITAL CORPORATION Plaintiff - Appellee	)	
v.	)	**Petition For Rehearing**
PRUDENTIAL SECURITIES INC, ET AL Defendants	)	
MISSISSIPPI DEPARTMENT OF ECONOMIC AND COMMUNITY DEVELOPMENT Defendant - Appellant	)	

[Filed October 2, 1998]

Appeal from the United States District Court for the Southern District of Mississippi, Jackson

ON PETITION FOR REHEARING

Before DAVIS, EMILIO M GARZA and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/_____
W. Eugene Davis
United States Circuit Judge

REHG- 2

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF MANDATE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 97-60835

MAGNOLIA VENTURE CAPITAL CORPORATION Plaintiff - Appellee	) Appeal from the United States District Court for the Southern District of Mississippi
v.	
PRUDENTIAL SECURITIES INC, ET AL Defendants	
MISSISSIPPI DEPARTMENT OF ECONOMIC AND COMMUNITY DEVELOPMENT Defendant - Appellant	

[Filed August 28, 1998]

Appeal from the United States District Court For the Southern District of Mississippi

Before DAVIS, EMILIO M. GARZA, and BENAVIDES, Circuit Judges.

No. 97-60835 *Magnolia Venture Capital Corporation v. Mississippi Department of Economic and Community Development*

W. EUGENE DAVIS, Circuit Judge:

In this appeal we are asked to consider whether the Eleventh Amendment bars this suit. The district court ruled that the Mississippi Department of Economic and Community Development had waived its Eleventh Amendment immunity, and therefore denied MDECD's Motion to Dismiss. For reasons set forth below, we reverse and remand this case to the district court.

I.

In *1994,* the Mississippi Legislature enacted the Venture Capital Act of *1994* ("the Act"), codified at Miss. Code Ann. §§ 5777-1 to 57-77-39. The Legislature passed the Act to provide capital to new growth-oriented businesses and create new jobs. In accordance with the Act, the Mississippi Department of Economic and Community Development ("MDECD"), an agency of the State of Mississippi, incorporated Magnolia Capital Corporation ("MCC"), a non-profit corporation. MDECD also formed a for-profit corporation known as Magnolia Venture Capital Corporation ("MVCC"), with MCC as the sole shareholder. In turn, MVCC created and served as the general partner in the Magnolia Venture Capital Fund Limited Partnership ("the Partnership"), which was to provide venture capital to Mississippi businesses.

In addition to creating these entities, the Legislature provided for funding of these corporations through the sale of $20,000,000 in general obligation bonds by the State Bond Commission. The proceeds of these bonds went to MDECD, which then made a $20,000,000 non-recourse loan to MCC.

MCC then deposited approximately $6,200,000 of the funds with the State Treasurer for investment in zero coupon bonds. MCC pledged these zero coupon bonds to secure the loan. MCC then invested the balance of the $20,000,000, or roughly $13,800,000, in MVCC as an equity contribution. MCC became MVCC's sole shareholder. MVCC then invested approximately $8,000,000 in the Partnership and procured a private investment totaling approximately $5,000,000. The Partnership began accepting applications for loans in January of 1996.

In April of 1997, Lisa Looser, purporting to act on behalf of MVCC, executed a Pledge Agreement purporting to grant a first priority security in certain assets of MVCC to MDECD.[1] This agreement secured the obligations, indebtedness, and liabilities under the Loan Agreement between MCC and MDECD. Later that month, MDECD notified MVCC that it was in default under the terms of the Loan Agreement and the Pledge Agreement, and requested that MVCC deliver the pledged assets to MDECD. This requested amount included approximately $11,000,000 that MVCC had invested with Prudential Securities, Inc. ("Prudential"). MVCC refused to deliver the assets and MDECD placed Prudential on notice of its claim to the funds and demanded that Prudential provide the funds to MDECD. Prudential responded by placing a "freeze" on the assets in its possession. As a result of this "freeze," MVCC filed for

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[1] MVCC alleges that Ms. Looser signed the document without any authority to act in a representative capacity for MVCC.

protection under Chapter 11 of the Bankruptcy Code.

After instituting the Chapter 11 proceeding, MVCC filed an adversary action against MDECD seeking a ruling that MDECD had no lien or interest in the funds held by Prudential. After MDECD moved to dismiss the proceeding on Eleventh Amendment grounds, MVCC voluntarily dismissed the action. However, MVCC contemporaneously filed a new adversary proceeding against Prudential seeking a release of the freeze on MVCC's assets in the Prudential investment account. MVCC also alleged that MDECD held no perfected lien or security interest in MVCC's assets in the hands of Prudential. MVCC requested a declaratory judgment that the assets in Prudential's possession were free and clear of any claim or lien by any third party. In response, MDECD sought leave to intervene in this adversary proceeding, which the bankruptcy court allowed. After MDECD intervened, Prudential filed a counterclaim in the nature of an interpleader against MVCC and named MDECD as a third-party defendant to the adversary proceeding. MVCC then filed a cross-claim against MDECD, alleging that MDECD had no interest in the assets held by Prudential.

After its intervention, MDECD moved to dismiss the proceeding based on a claim of Eleventh Amendment immunity. MDECD's motion focused mainly on establishing the unconstitutionality of § 106 of the Bankruptcy Code, 11 U.S.C. § 106, in which Congress purported to abrogate the sovereign immunity of states and state agencies which file claims in bankruptcy proceedings. The district court, relying on In re Estate of Fernandez, 123 F.3d 241 (5th Cir. 1997),

agreed with MDECD that § 106 violated the Eleventh Amendment and was ineffectual as a waiver of sovereign immunity. However, the district court further found that MDECD had waived its Eleventh Amendment immunity through a venue clause in the Pledge Agreement, and, therefore, denied MDECD's Motion to Dismiss. MDECD now appeals that ruling.

II.

A.

In Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 113 S. Ct. 684 (1993), the Supreme Court held that "States and state entities that claim to be 'arms of the State' may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity." Id. at 147, 113 S. Ct. at 689. Thus, we have appellate jurisdiction to review the district court's interlocutory order denying MDECD's Motion to Dismiss based on the Eleventh Amendment. See also Earles v. State Bd. of Certified Pub. Accountants, 139 F.3d 1033, 1036 (5th Cir. 1998).

B.

In this appeal, we focus on whether the district court correctly denied MDECD's Motion to Dismiss based on Eleventh Amendment immunity. The district court concluded that MDECD was entitled to assert Eleventh Amendment immunity, but that MDECD had waived such immunity by virtue of a provision in the Pledge Agreement that provided

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as follows:

> Section 6.03 Applicable Law. This Pledge shall be deemed to have been made and to be performed in Jackson, Hinds County, Mississippi, and shall be governed by and construed in accordance with the laws of the State of Mississippi. Courts within the State of Mississippi shall have jurisdiction over any and all disputes between the parties to this Pledge, whether in law or in equity, including but not limited to, all disputes arising out of or relating to this Pledge. Venue in any such dispute, *whether in federal or state court,* shall be laid in Hinds County, Mississippi.

(Emphasis added).

On appeal, MDECD makes a two-pronged argument. MDECD argues first that the above language of the venue provision does not clearly waive its Eleventh Amendment immunity. Second, MDECD argues that even if the venue provision is construed as waiving Eleventh Amendment immunity, MDECD had no authority to waive this important right.

The district court, in rejecting both of MDECD's arguments, held that the language of the venue provision was sufficiently clear to amount to a waiver of Eleventh Amendment immunity. The district court also rejected MDECD's argument that it had no authority to waive

Eleventh Amendment immunity. The district court reasoned that Mississippi, by authorizing MDECD to enter into a contract in which MDECD waived its Eleventh Amendment immunity, must be considered as authorizing that waiver.

III.
A.

Assuming without deciding that the language in the venue provision of the Pledge Agreement reflects a clear waiver of Eleventh Amendment immunity, we are satisfied that MVCC has not demonstrated that the state agency, MDECD, was authorized to waive Mississippi's important right of immunity from suit in federal court.

In concluding that MDECD was authorized to waive Mississippi's Eleventh Amendment immunity, the district court reasoned as follows: first, the court correctly concluded that under clear Mississippi Supreme Court authority, "sovereign immunity does not bar action against the State or its political subdivisions brought on a breach of contract theory." Trammell v. State, 622 So. 2d 1257, 1262 (Miss. 1993). The district court observed that this principle is based on the notion that "[w]here the state has lawfully entered into a business contract with an individual, the obligations and duties of the contract should be mutually binding and reciprocal. There is no mutuality or fairness where a state or county can enter into an advantageous contract and accept its benefits but refuse to perform its obligations." Churchill v. Pearl River Basin Dev. Dist., 619 So. 2d 900, 903 (Miss. 1993).

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The district court reasoned next that because the venue provision waived the State's Eleventh Amendment immunity, "there would be 'no mutuality or fairness' in allowing the Department to assert the Pledge Agreement in support of its claim to the funds in question and yet at the same time permit it to avoid challenges to the validity of the agreement or the correctness of the Department's claim to an interest predicated on that agreement." Thus, based on this reasoning, the district court concluded that the State also waived its Eleventh Amendment immunity defense by giving general authority to MDECD to enter into contracts, and the specific contract at issue included an Eleventh Amendment waiver.

The district court correctly recognized that under Mississippi law, when the Legislature authorizes a state agency to enter into a contract, the State waives its immunity from suit for a breach of that contract. See, e.g., Grant v. State, 686 So. 2d 1078, 1091-92 (Miss. 1996); Trammell v. State, 622 So. 2d 1257, 1261-62 (Miss. 1993); Churchill v. Pearl River Basin Dev. Dist., 619 So. 2d 900, 903 (Miss. 1993); Mississippi State Dept. of Public Welfare v. Howie, 449 So. 2d 772, 777 (Miss. 1984). This rule is based on mutuality and fairness. Mississippi State Dept. of Public Welfare, 449 So. 2d at 777. That principle is not in dispute. The issue before us narrows to whether the district court correctly extended Mississippi's rule on waiver of common law sovereign immunity to encompass Mississippi's waiver of its Eleventh Amendment immunity where the State authorized an agency to enter into a contract, and that contract included a waiver of Eleventh Amendment immunity. We are persuaded that important federalism concerns which underlie

No. 97-60835 *Magnolia Venture Capital Corporation v. Mississippi Department of Economic and Community Development*

the Eleventh Amendment will not permit this extension.[2]

B.

The doctrine of sovereign immunity embodies the maxim that 'the King can do no wrong," and can be traced back to ancient times.[3] Sovereign immunity, as it has been interpreted in the federal courts, actually encompasses two separate, but related, concepts--state sovereign immunity, or common law sovereign immunity, and Eleventh Amendment immunity, or constitutional sovereign immunity. 13 CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3524, at 171 (2d ed. 1984).[4] These immunities shield the sovereign, or the

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[2] See, e.g., Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 304-06, 110 S. Ct. 1868, 1872-73 (1990); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99-100 & n.9, 104 S. Ct. 900, 907-08 & n.9 (1984).

[3] See generally 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 123 App.01 (3d ed. 1997).

[4] See also Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54, 116 S. Ct. 1114, 1122 (1996) ("' [W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition which it confirms.' That presupposition, first observed over a century ago in Hans v. Louisiana, has two parts: first, that each State is a sovereign entity in our federal system; and second, that 'it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its

state, from suits against it in its own courts as well as from suits against it in federal courts.

A state's immunity, however, is not absolute. For example, a state may choose to waive its immunity, thus consenting to suit.[5] However, it is important to keep in mind that a state may waive its common law sovereign immunity without waiving its Eleventh Amendment immunity under federal law. Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 306, 110 S. Ct. 1868, 1873 (1990); see also In re Allied Signal, Inc., 919 F.2d 277, 280 n.4 (5th Cir. 1990). Thus, a state may consent to being sued in its own courts, while still retaining Eleventh Amendment immunity from suit in federal court. See, e.g., Florida Dept. of Health and Rehabilitative Servs. v. Florida Nursing Home Assoc., 450 U.S. 147, 150, 101 S. Ct. 1032, 1034 (1981) (state's general waiver of sovereign immunity did not constitute waiver by state of Eleventh Amendment immunity); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 54-55, 64 S. Ct. 873, 877 (1944) (same); Sherwinski v. Peterson, 98 F.3d 849, 851-52 (5th Cir. 1996) (same).

The Supreme Court has made it clear that we may find a waiver of a state's Eleventh Amendment immunity in only

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consent.'") (internal citations omitted); In re Allied-Signal, Inc., 919 F.2d 277, 280 n.4 (5th Cir. 1990).

[5] See generally 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 123.21 (3d ed. 1998).

the most exacting circumstances. "[T]he State's consent [to suit in federal court must] be unequivocally expressed." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99, 104 S. Ct. 900, 907 (1984); see also Port Authority Trans-Hudson Corp., 495 U.S. at 305, 110 S. Ct. at 1873 ("The Court will give effect to a State's waiver of Eleventh Amendment immunity only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction."). A clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found. Pennhurst State Sch. & Hosp., 465 U.S. at 99 n.9, 104 S. Ct. at 907 n.9 (quoting Great N. Life Ins. Co., 322 U.S. at 54, 64 S. Ct. at 877). As the Supreme Court has stated, the "reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system." Pennhurst State Sch. & Hosp., 465 U.S. at 99, 104 S. Ct. at 907; see also Port Authority Trans-Hudson Corp., 495 U.S. at 304-06, 110 S. Ct. at 1872-73. Additionally, the state's waiver must be accomplished by someone to whom that power is granted under state law. Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 467, 65 S. Ct. 347, 352 (1945); see also Dagnall v. Gegenheimer, 631 F.2d 1195, 1196 (5th Cir. 1980).

With this background, we now consider the precise issue presented in this case: whether the district court erred in concluding that MDECD had authority to waive Mississippi's Eleventh Amendment immunity from suit in

federal court.[6]

C.

In determining whether a state official or entity has authority to waive Eleventh Amendment immunity, the Supreme Court has directed that we look to the "general policy of the state as expressed in its Constitution, statutes and decisions." Ford Motor Co., 323 U.S. at 467, 65 S. Ct. at 352; see also Dagnall, 631 F.2d at 1196. This authority must be clearly expressed. In Freimanis v. Sea-Land Serv., Inc., 654 F.2d 1155 (5th Cir. 1981), this Court considered whether the State of Louisiana had waived its Eleventh Amendment immunity when an attorney representing the State's Department of Transportation entered into a consent judgment with the defendant, Sea-Land. In answering this question in the negative, we stated that "[t]he short answer to this contention is that the attorney for the Department had no

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[6] As an initial matter, MVCC argues that MDECD is not entitled to raise Eleventh Amendment immunity because MVCC does not seek a money judgment against the State. MVCC therefore contends that Mississippi is not a real party in interest in the suit.

As the district court noted in rejecting this argument, "application of the Eleventh Amendment is not limited to those cases in which a money judgment is sought against a state." See, e.g., Cory v. White, 457 U.S. 85, 102 S. Ct. 2325 (1982). Additionally, this action involves rights to allegedly public funds claimed by the State. We therefore agree with the district court that MDECD, a state agency, is entitled to assert Eleventh Amendment immunity.

clearly expressed authority to waive Eleventh Amendment immunity. Indeed, Louisiana has clearly expressed its intention to preserve its immunity." Id. at 1160 (emphasis added); see also Santee Sioux Tribe v. Nebraska, 121 F.3d 427, 431 (8th Cir. 1997) ("a state official may waive the state's immunity only where specifically authorized to do so by that state's constitution, statutes, or decisions"); Estate of Porter v. Illinois, 36 F.3d 684, 690 (7th Cir. 1994) ("state officials can only waive a state's Eleventh Amendment immunity if they are specifically authorized to do so by the state's constitution, statutes, or decisions"); Silver v. Baggiano, 804 F.2d 1211, 1214 (llth Cir. 1986) ("waiver of Eleventh Amendment immunity by state officials must be explicitly authorized by the state 'in its Constitution, statutes and decisions'").[7]

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[7] Indeed, given the recognition of strong federalism concerns and the concomitant strict solicitude federal courts give to a state's purported waiver of Eleventh Amendment immunity, see, e.g., Port Authority Trans-Hudson Corp., 495 U.S. at 305-06, 110 S. Ct. at 1872-73, other circuits have gone so far as to conclude that affirmative acts by state officials did not amount to the state's waiver of Eleventh Amendment immunity where the state official was not specifically authorized to waive the immunity. In Estate of Porter v. Illinois, 36 F.3d 684 (7th Cir. 1994), the Seventh Circuit held that the Illinois Attorney General was not authorized to waive Illinois' Eleventh .Amendment immunity, and therefore, could not make a valid waiver of immunity by removing the case to federal court. Id. at 691; see also Silver v. Baggiano, 804 F.2d 1211, 1214-15 (llth Cir. 1986) (holding removal by state officials of suit containing state law claims not a valid waiver of Eleventh

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As noted above, the district court was entirely correct in concluding that Mississippi law is clear that when the Legislature authorizes an agency to enter into contracts, the State waives its immunity from suit in state court for a breach of a contract. But none of these cases involved the waiver of Eleventh Amendment immunity and consent to suit in federal court. In other words, while Mississippi may waive immunity from suit in its own courts by authorizing state agencies to enter into contracts, there is no Mississippi law to support the implication that MDECD had the authority to waive Mississippi's Eleventh Amendment immunity.

The authorities discussed above lead us to conclude that a state, through its constitution, statutes, or court decisions, must expressly authorize a state agency or representative to waive the state's Eleventh Amendment immunity. Such authority cannot be implied from the circumstances. Although the district court's conclusion that the State implicitly authorized the waiver of its Eleventh Amendment right has a logical and equitable tug, no Mississippi authority supports this determination. Given the reluctance of courts generally to find a waiver of Eleventh

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Amendment immunity where officials were not authorized to waive immunity). Similarly, in In re Creative Goldsmiths of Washington, D.C., Inc., 119 F.3d 1140 (4th Cir. 1997), the Fourth Circuit concluded that the State of Maryland's defense on the merits of a suit arising out of a bankruptcy proceeding did not amount to a waiver of Eleventh Amendment immunity because the Maryland Attorney General lacked authority to waive Maryland's Eleventh Amendment immunity. Id. at 1149.

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Amendment immunity and the strong general rule that authority to make an effective waiver must be express, we conclude that the district court erred in determining that MDECD had authority to waive Mississippi's Eleventh Amendment immunity.[8]

Although it is unnecessary to our decision, the parties have called our attention to a recent Mississippi statute that confirms our conclusion that Mississippi did not authorize MDECD to waive the State's Eleventh Amendment immunity.[9]

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[8] In addition to arguing that MDECD waived its Eleventh Amendment immunity, MVCC also argues that alternative grounds exist to support the district court's denial of MDECD's Motion to Dismiss. See In re Sims, 994 F.2d 210, 214 (5th Cir. 1993) (holding that appellee's arguments in support of a favorable judgment should be included in appellee's answering brief, not in a cross-appeal). MVCC argues, as it did in the district court, that MDECD lacks standing as a party in interest to the adversary proceeding filed by MVCC against Prudential because MDECD is neither a creditor of MVCC, nor does MDECD hold any interest in the property at issue. As we stated above, our appellate jurisdiction is limited to reviewing the district court's denial of Eleventh Amendment immunity. See Puerto Rico Aqueduct and Sewer Auth., 506 U.S. at 144-45; 113 S. Ct. at 688.

[9] On April 17, 1998, Mississippi adopted House Bill No. 1240 regarding the Venture Capital Act of 1994. Specifically, Miss. Code Ann. § 57-77-3, as amended, provides in pertinent part as follows:

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Except as provided in Section 57-77-33(7), it is, and has always been, the intent of the Legislature that nothing in this chapter shall be construed to waive the sovereign immunity of the State of Mississippi or the department pursuant to either state law or the Eleventh Amendment to the United States Constitution. It is, and always has been, the intent of the Legislature that no action by the State of Mississippi or by the department, or by any officer or agent of the State of Mississippi or of the department, shall be considered a waiver of the sovereign immunity of the State of Mississippi or the department pursuant to either state law or the Eleventh Amendment to the United States Constitution. It is, and always has been, the intent of the Legislature that the entering into of any contract, loan agreement, pledge agreement, or other instrument by the State of Mississippi or the department shall not be considered a waiver of the sovereign immunity of the State of Mississippi pursuant to either state law or the Eleventh Amendment to the united States Constitution. It is, and always has been, the intent of the Legislature that the sovereign immunity of the State of Mississippi pursuant to either state law or the Eleventh Amendment to the United States Constitution may only be waived by express authorization set forth in an enactment of the Mississippi Legislature.

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IV.

In summary, because MDECD lacked specific express authorization to waive Mississippi's Eleventh Amendment immunity, the district court erred in denying MDECD's Motion to Dismiss on Eleventh Amendment grounds. However, because our review is limited to the immunity question, we are unable to resolve the remaining issues in this case and we REMAND it to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

No. 3:97CV513LN

IN RE MAGNOLIA VENTURE CAPITAL CORPORATION) **MEMORANDUM OPINION AND ORDER**

[Filed November 20, 1997]

In this adversary proceeding, the Mississippi Department of Economic and Community Development (the Department) initially moved the bankruptcy court to dismiss the case as barred by the Eleventh Amendment to the United States Constitution, and the debtor-in-possession, Magnolia Venture Capital Corporation (Magnolia), responded in opposition to the motion. Thereafter, the Department moved to withdraw the reference to the bankruptcy court in order that this court, rather than the bankruptcy court, could consider and resolve the jurisdictional issue raised by the Department's attempted invocation of its Eleventh Amendment immunity. By memorandum opinion and order dated August 28, 1997, this court granted the Department's motion. The court has since provided the parties full opportunity to brief the issues presented and the court, having now carefully considered each of the parties' various arguments for and against dismissal,

concludes, for reasons which Follow, that the Department's motion should be denied.

The facts leading to the present litigation are as follows. In 1994, the Mississippi Legislature enacted the Mississippi Venture Capital Act of 1994, codified at Miss. Code Ann. § 57-77-1 et seq., for the avowed purpose of "increasing the rate of capital formation; stimulating new growth-oriented business formations; creating new jobs for Mississippi; developing new technology; enhancing tax revenue for the state; and supplementing conventional business financing." Miss. Code Ann. § 57-77-3. In accordance with the Act and the legislative directive therein, the Mississippi Department of Economic and Community Development, an agency of the State of Mississippi created by Miss. Code Ann. § 57-1-52, caused the incorporation of Magnolia Capital Corporation (Magnolia Capital), a non-profit corporation, and further formed a for-profit corporation known as Magnolia Venture Capital Corporation (Magnolia), of which Magnolia Capital was the sole shareholder. As contemplated by the Act, Magnolia in turn created and served as the general partner in Magnolia Venture Capital Fund Limited Partnership (the Partnership), whose purpose was "to provide venture capital to Mississippi businesses, to provide financing to high-growth oriented businesses, and to undertake any acts appropriate or necessary to carry out" these purposes. In addition to providing for the creation of these various entities, the legislature provided for funding of these corporations by the sale of $20,000,000 in general obligation bonds the State Bond Commission, with the proceeds going to the Department, and the Department then entering into a Loan Agreement with Magnolia Capital,

evidencing a $20,000,000 non-recourse loan to Magnolia Capital. Of that amount, Magnolia Capital deposited approximately $6,700,000 with the State Treasurer for investment in zero coupon bonds that were pledged to secure the loan, all pursuant to the Act. In further keeping with the Act, Magnolia Capital then invested the balance of the $20,000,000, or about $13,600,000, in Magnolia, as an equity contribution and became Magnolia's sole shareholder. Magnolia, in turn, invested approximately $8,000,000 of that sum in the Partnership, in addition to procuring a private investment totaling approximately $5,000,000. The Partnership began accepting applications for loans in January 1996.

In April 1997, Lisa Looser, apparently on behalf of Magnolia, executed a Pledge Agreement purporting to grant the Department a first priority security in certain assets to secure the obligations, indebtedness and liabilities under the Loan Agreement between Magnolia Capital and the Department. Later that month, the Department notified Magnolia that it was in default under the Loan Agreement and Pledge Agreement and requested that Magnolia deliver the pledged assets to the Department, including approximately $11,000,000 that had been invested by Magnolia and the Partnership with Prudential. According to the Department, when Magnolia refused to deliver the assets, it placed Prudential on notice of its claim to the funds and demanded that Prudential provide the funds to the Department. As a consequence of the Department's notice, Prudential did not turn over the funds to the Department, but it did place a "freeze" on the assets in its possession. Magnolia submits that as a result of these circumstances, its only option was to

file for protection as a Chapter 11 debtor under the Bankruptcy Code, which it did in May 1997.

After instituting its Chapter 11 proceeding, Magnolia filed an adversary proceeding against the Department, seeking an adjudication that the Department had no lien against or interest in the funds held by Prudential. When the Department thereafter moved to dismiss the adversary proceeding complaint as being barred by the Eleventh Amendment, Magnolia voluntarily dismissed its complaint against the Department, but it contemporaneously filed a new adversary proceeding against Prudential alleging that "[t]he Department does not hold a perfected lien or security interest in the Debtor's Assets or the Partnership's Assets in the possession of Prudential," and requesting a declaratory judgment adjudicating that the assets in Prudential's possession constituted Partnership property, "free and clear of any claim or lien by any third party."

The Department sought leave to intervene in Magnolia's adversary proceeding against Prudential for the disclosed purpose of asserting the Eleventh Amendment jurisdictional bar to any adjudication by the bankruptcy court respecting the funds in which the Department claimed an interest. The bankruptcy court did permit the Department to intervene, though it declined to allow intervention solely for the purpose of permitting the Department to assert its immunity and instead gave the Department the choice of

intervening for all purposes or not at all.[1] When the Department did intervene, Prudential filed a counterclaim in the nature of interpleader against Magnolia and named the Department as a third-party defendant to that claim. And thereafter, Magnolia filed its own cross-claim against the Department, seeking, as it had in the first dismissed adversary proceeding, an adjudication that the Department has no valid security interest in the assets held by Prudential.

Following its intervention, the Department moved to withdraw the reference of the adversary proceeding to the bankruptcy court and more or less contemporaneously to

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[1] At a hearing before the bankruptcy court, the court stated:

> And the court will permit the Department to intervene, but not on the terms which they sought. Under the Federal Rules of civil Procedure 24(a) (2) provides that upon timely application anyone should be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action, and so forth.
>
> And obviously they can claim an interest because they have asserted a pledge on the assets and placed a freeze on it, and that's the whole subject matter. So they will be permitted to intervene under that Rule. However, the language that was contained in the order where they wanted to do it for limited purposes is not appropriate, and they will be allowed to intervene. And if they want to, fine. If they don't want to, that's their business. But it won't be any qualified intervention. It will be a straight intervention.

dismiss the adversary proceeding based on its claimed Eleventh Amendment immunity. The Department's motion focused primarily on establishing the unconstitutionality of § 106 of the Bankruptcy Code, 11 U.S.C. § 106, by which Congress purported to abrogate the sovereign immunity of and thereby confer jurisdiction over states and state agencies which filed claims in bankruptcy proceedings.[2] Citing the reasoning of the United States Supreme Court in Seminole Tribe of Florida v. Florida, 517 U.S. --, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996), the Department argued that the bankruptcy court's reliance on the purported Congressional waiver of Eleventh Amendment immunity in § 106 as a means of establishing and exerting jurisdiction over the Department was not well founded inasmuch as § 106 violated the Eleventh Amendment and, being unconstitutional, was thus ineffectual as a waiver of Eleventh Amendment immunity. Though the Fifth Circuit has now confirmed the Department's position as the law of this circuit, see Department of Transportation and Dev. State of La. v. PNL Asset Mgmt. Co. (In re Fernandez, 123 F.3d 241, 246 (5th Cir. 1997) (§ 106 is unconstitutional as "Congress cannot locate the authority claimed here to abrogate sovereign immunity in either the Bankruptcy Clause

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[2] The statute, as amended, reads as follows:

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections **105, 106, . . . 362, . . . 547, 548 . . .** of this title.

or in Section 5 of the Fourteenth Amendment"), that does not resolve the Department's motion, for there remain for consideration a number of issues, including whether the Department has, by its own affirmative actions, waived its Eleventh Amendment sovereign immunity as to any adjudication of its claimed interest in the subject property, and if so, whether it possessed the authority to affect such a waiver.

Before reaching those specific issues, the court notes that it does recognize Magnolia's contention that the issue of whether the Department has, in fact, purported to waive its Eleventh Amendment immunity is irrelevant since in any event, i.e., irrespective of whether the Department has waived its immunity, the Department lacks standing to assert any claim to the subject property because it is not a creditor of Magnolia and because it holds no interest in the property at issue. In its earlier opinion addressing the Department's motion for withdrawal of reference, the court noted Magnolia's argument that the Department lacks standing

> to assert any claim to the subject property since [it] has no valid and enforceable interest in the property. In other words, ... because [the Department's] claim has no merit, then [the Department] lacks standing and the bankruptcy court may dismiss [the Department's] claim based on that lack of standing, without having to consider and/or decide any jurisdictional issue relating to the Eleventh Amendment.

This court rejected Magnolia's contention, finding it

unreasonable to suggest that resolution of the jurisdictional issue--by which the court meant the issue relating to the Department's claim of Eleventh Amendment immunity--could simply be avoided by a ruling on the merits of the adversary proceeding. While that certainly is true, it is perhaps more accurate to say that because the parties herein have raised two preliminary jurisdictional issues--standing and Eleventh Amendment immunity--and one of those two issues, namely standing, is intertwined with the merits of the case, then the more reasonable approach is to first consider whether the Department, regardless of its standing or lack thereof, enjoys Eleventh Amendment sovereign immunity which prevents this or any federal court from adjudicating the parties' dispute. In other words, as neither this court nor the bankruptcy court would need to resolve Magnolia's standing challenge if this court were to find merit in the Department's immunity claim,[3]

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[3] The converse is obviously true, as well, in that if the court were to consider the standing issue and conclude that the Department lacked standing, then there would be no need to address the immunity argument. But the point which the court makes is that since consideration of the standing issue involves consideration of the merits of the case and consideration of the immunity issue does not, then clearly the better and more reasonable course is to treat the immunity issue first. That this is so is suggested by the following comments by the Fifth Circuit in Barrett Computer Services, Inc. v. PDA, Inc., 884 F.2d 214, 218 (5th Cir. 1989), in which the court explained:

> Challenges to standing are disposed of in a number of ways, and it is difficult to extract a rule from the cases that clearly identifies the proper method for resolving a

then this court should and will address the Eleventh Amendment issue first.

The Department submits that as a state agency established pursuant to § 57-1-52 and related sections of Mississippi Code, it has sovereign immunity from suit which it has not waived and that therefore, the claims against it must be dismissed. Magnolia asserts several reasons why it contends that this is not the case. First, it asserts that the Department is not in a position to assert the protection of the Eleventh Amendment because the State itself is not the real party in interest in the suit. See Richardson v. Southern Univ., 118 F.3d 450, 452 (5th Cir. 1997) citing Edelman v. Jordan, 415 U.S. 651, 653, 94 S. Ct. 1347, 1350, 39 L. Ed. 2d 662 (1974)) (though state not named as party defendant, suit "may nonetheless succumb to Eleventh Amendment

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particular standing problem. Some are disposed of on the pleadings. Alternatively, in cases in which the merits of the claims asserted are intertwined with the jurisdictional issue of standing, challenges to standing are frequently resolved in summary judgment proceedings--where the nonmovant is granted all reasonable factual inferences and the movant cannot succeed unless the court finds that no genuine issue of material fact exists--or at a trial on the merits. In such cases, to compel a preliminary factual inquiry into the plaintiff's standing would force the party bringing the suit to prove merit issues in order to establish jurisdiction.

immunity if the State is the real party in interest").[4] Magnolia does not deny that the Department is an agency of the State of Mississippi which, in a given case, might properly claim the State's sovereign immunity. It contends, though, that the State is not the real party in interest in the adversary proceeding because the suit seeks neither to recover damages that would be payable from the state treasury nor to compel or forbid any action by the state. Hughes v. Savell, 902 F.2d 376 (5th Cir. 1990) (citing Pennhurst State School and Hosp. v. Halderman, 465 U.S. 89, 100, 104 S. Ct. 900, 908, 79 L. Ed. 2d 67 (1984)) ("The state is the real party in interest if the decision rendered in a case would operate against the sovereign, expending itself on the public treasury, interfering with public administration, or compelling the state to act or to refrain from acting."). That is to say, Magnolia argues that since it is not seeking to recover any damages from the State, then the State is not a real party in interest to the adversary proceeding. However, application of the Eleventh Amendment is not limited to those cases in which a money judgment is sought against a state. And in fact, the Supreme Court has specifically found that it applies in the context of interpleader actions in which a state asserts a claim to the stake. Cory v. White, 457 U.S. 85, 102 S. Ct. 2325, 72 L. Ed. 2d 694

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[4] The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State.

(1982) (interpleader action brought against states of Texas and California was a suit against those states which was barred by the Eleventh Amendment); see also In re Sand Bar I, Inc., No. 91-1983, 1992 WL 84277 (E.D. La. 1992) ("The Eleventh Amendment bars interpleader actions in which a State or States are named defendants."); cf. Fitzgerald v. Unidentified Wrecked and Abandoned Vessel, 866 F.2d 16 (lst Cir. 1989) (Eleventh Amendment bars suit to determine of sunken vessel when a state claims ownership).

In a related vein, Magnolia, pointing out that it instituted adversary proceeding against *Prudential,* not against the *Department*, argues that the Department cannot properly and effectively invoke *its* Eleventh Amendment immunity on behalf of *Prudential*, the party against which the adversary proceeding was brought in the first place, and that regardless of the Department's entitlement to Eleventh Amendment immunity as to Prudential's interpleader complaint and Magnolia's cross-claim, Magnolia's right to proceed on its claim against Prudential cannot be thwarted by the Department's claimed immunity. The court cannot agree.

The adversary proceeding brought by Magnolia seeks turn-over of funds held by Prudential--which the Department contends constitute public funds--and an adjudication that the funds are free and clear of any claim or lien of any "third party," i.e., the Department. In other words, Magnolia's sole purpose in initiating the adversary proceeding was to prevent

the Department from recovering the funds.[5] The fact of the matter is, the only "third party" claiming an interest or right to the funds is the Department, and the singular goal of the adversary proceeding--including the main claim by Magnolia against Prudential, the interpleader counterclaim and complaint by Prudential and the cross-claim by Magnolia--is an adjudication of the issue whether the Department has a valid claim of right to the subject funds. Under these circumstances, the claims are all directed against the Department and are subject to its claim of immunity.

The next question raised by Magnolia, though, is whether the Department, assuming it could have immunity, has waived that immunity. Magnolia maintains that the Department has waived any Eleventh Amendment sovereign immunity it might otherwise have been able to claim, by voluntarily appearing in the adversary proceeding and/or by consenting to suit in the Pledge Agreement upon which it predicates its claim to the funds. While the court finds no merit in the former contention, the court does view the terms of the Pledge Agreement as constituting a waiver of Eleventh Amendment immunity, or consent to suit in federal court for disputes relating to the Pledge Agreement.

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[5] And in the court's view, it appears quite likely that the sole reason for Magnolia's attempt to achieve this result indirectly by proceeding against Prudential rather than by seeking to directly litigate the issue of Magnolia's and the Department's respective rights to the monies, was that it hoped to circumvent the Department's immunity.

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With respect to Magnolia's contention that the Department's appearance constitutes a waiver, the court notes that the Supreme Court has held that a state's voluntary intervention in a federal interpleader action for the purpose of asserting a claim to the interpled funds or property will constitute a waiver of the state's Eleventh Amendment immunity. See Clark. v. Barnard, 108 U.S. 436, 2 S. Ct. 878, 27 L. Ed. 780 (1883) (by intervening as claimant in federal court, Rhode Island agreed to have federal.1 court determine rights of state and other claimants to the fund). Here, however, the court cannot reasonably conclude that the Department voluntarily intervened in the adversary proceeding in order to assert a claim to the property. It is true that the Department voluntarily moved to intervene. However, the parties agree, and it is clear from the record that the Department sought to intervene as a means of apprising the bankruptcy court of its claimed interest in the property and to further apprise the court that in view of its Eleventh Amendment immunity, the bankruptcy court was precluded From adjudicating the parties' competing claims to the property. By contemporaneously objecting to federal jurisdiction at the time it moved to intervene, the Department did not agree to have the Federal court determine the parties' respective rights to the property.

This court recognizes, of course, that in its order allowing the Department to intervene, the bankruptcy court refused to permit a qualified intervention and ruled instead that the Department could intervene for all purposes or not at all--which is to say, the bankruptcy court placed the Department in the untenable position of either forfeiting its Eleventh Amendment immunity or forfeiting its claim to the

property. Under these circumstances, it can hardly be concluded that the Department's actions in response to the court's order were *voluntary* so as to constitute a waiver, particularly in light of the further fact that the first step taken by the Department upon its intervention was its filing of a motion to dismiss on Eleventh Amendment grounds. Therein, the Department argued that "because of the Eleventh Amendment sovereign immunity of [the Department] as an agency of the State of Mississippi," the bankruptcy court "[did] not have jurisdiction to return the assets held by Prudential to Debtor free and clear of any claim of lien of any third party." Two weeks later, the Department filed its motion for withdrawal of reference and to dismiss based on the Department's Eleventh Amendment immunity. See In re Sand Bar, Inc., 1992 WL 84277, at *1 n.1 (argument that state consented to suit by appearing in action was without merit where Mississippi had to either file a claim in [the] action or risk forfeiting its right to recover anything from Petitioners."). Magnolia's position on this point is rejected.

Again, though, Magnolia argues that even if the court concludes that the Department did not waive its immunity by voluntarily appearing in the case, the court still must conclude that the Department waived its immunity by virtue of a provision in the Pledge Agreement which states:

> [C]ourts within the State of Mississippi shall have jurisdiction over any and all disputes between the parties to this Pledge, whether in law or in equity, including but not limited to, all disputes arising out of or relating to this Pledge. Venue in any such dispute, whether in

> federal or state court, shall be laid in Hinds County, Mississippi.

It is manifest that what has arisen and is the subject of the litigation in this adversary proceeding is a "dispute between the parties to [the Pledge . . . arising out of or related to [the] Pledge." Further, the import of the quoted provision is unmistakable: the Department purported by this language to waive its sovereign immunity for suits arising out of or related to the Pledge Agreement. Moreover, in the court's opinion, and contrary to the position urged by the Department, by virtue of the Department's inclusion of the venue provision, the Department purported to waive, in sufficiently explicit terms, not only its sovereign immunity from suits in state court, but also its Eleventh Amendment immunity.[6]

In an analogous case, the Supreme Court considered whether the State of New York had waived the Eleventh Amendment immunity of the New York Port Authority in Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 110 S. Ct. 1868, 109 L. Ed. 2d 264 (1990). There, the Court

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[6] A "State's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued." Pennhurst State School and Hosp. v. Halderman, 465 U.S. 89, 99, 104 S. Ct. 900, 907, 79 L. Ed. 2d 67 (1984). It is thus understood that a State does not waive its immunity from suit in federal court merely by its waiver of sovereign immunity in its own courts. Id. at 99 n.9, 104 S. Ct. at 907 n.9. See also Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 110 S. Ct. 1868, 109 L. Ed. 2d 264 (1990).

recognized first that a general consent to suit provision, standing alone, would not be sufficient to waive Eleventh Amendment immunity since a waiver of Eleventh Amendment immunity must be express and unambiguous and since a general consent to suit provision could readily be construed as a waiver only of immunity for suits in state court. However, the Court held that where a venue provision which expressly provided for venue in "a county or judicial district established . . . by the United States" was included within the same statute as the provision for consent to suit, the venue provision constituted "textual evidence of consent to suit in federal court" and resolved any ambiguity that might otherwise have existed. In other words, "the statutory venue provision suffice[d] to resolve any ambiguity contained in the States' general consent to suit provision by expressly indicating that the States' consent to suit extends to suit in federal court." Id. at 306, 110 S. Ct. at 1873. Likewise, in the case at bar, by the language set forth in the Pledge Agreement, the Department unequivocally purported to consent to resolution of "any and all disputes between the parties . . . arising out of or relating to th[e] Pledge" by "courts within the State of Mississippi." In the absence of the additional venue provision, the extent of this waiver might be considered ambiguous and thus not construed to constitute a waiver of Eleventh Amendment immunity. But the additional provision laying venue "in federal or state court . . . in Hinds County, Mississippi" clarifies the Department's intent and removes any ambiguity.

Still that does not end the court's inquiry regarding the immunity issue inasmuch as the Department asserts that even if the language of the Pledge Agreement could properly be

construed as a waiver of its Eleventh Amendment immunity, the waiver provision is ineffectual since the Department lacked authority to waive its sovereign immunity. In support of this position, the Department has directed the court to a number of cases which have recognized that "Mississippi law requires express statutory authorization before the state's sovereign immunity can be waived." McKay v. Boyd Constr. Co., Inc., 769 F.2d 1084, 1087 (5th Cir. 1985) (citing Karpovs v. Mississippi, 663 F.2d 640, 645 (5th Cir. 1981), and Jagnandan v. Mississippi State Univ., 373 So. 2d. 252, 254 (Miss. 1979)). The Department argues that since nothing in the state governing the Department or in the Mississippi Venture Capital Act purports to waive the Department's Eleventh Amendment sovereign immunity, then it must be concluded that the Department's waiver is intact, regardless of its attempted waiver in the Pledge Agreement.

In response to the Department's argument on this point, Magnolia has directed the court to several cases which have held that "sovereign immunity does not bar action against the State or its political subdivisions brought on a breach of contract theory." Trammell v. State of Miss., 622 So. 2d 1257, 1262 (Miss. 1993); Churchill v. Pearl River Basin Dev. Dist., 619 So. 2d 900, 903 (Miss. 1993) ("Sovereign immunity does not bar actions against the state or its political subdivisions brought on a breach of contract theory."). This principle is based on the notion that,

> [w]here the state has lawfully entered into a business contract with an individual, the obligations and duties of the contract should be mutually binding and reciprocal. There is no

> mutuality or fairness where a state or county can enter into an advantageous contract and accept its benefits but refuse to perform its obligations.

In the case at bar, the Department does not contend that it lacked legislative authorization to enter the Pledge Agreement and in the court's opinion, it had such authority. Consequently, the Department not only had the concomitant authority to waive its immunity for any claims brought against it for breach of the terms of that agreement, but the act of executing the agreement constituted a waiver of immunity for claims against the Department for any breach of the agreement as a matter of law. And while the claims asserted against the Department in this case are not strictly for breach of the contract per se, the rationale upon which the judicial recognition of waiver by contract is equally applicable. That is, there would be "no mutuality or fairness" in allowing the Department to assert the Pledge Agreement in support of its claim to the funds in question and yet at the same time permit it to avoid challenges to the validity of the agreement or the correctness of the Department's claim to an interest predicated on that agreement. For these reasons, therefore, the court concludes that the Department has clearly, unequivocally and effectively waived its Eleventh Amendment immunity, and for that reason, the Department's motion to dismiss will be denied.

As the court indicated supra, it granted the Department's motion for withdrawal of reference solely for the purpose of resolving the jurisdictional issue related to the Eleventh Amendment. The separate jurisdictional issue arising

from Magnolia's challenge to the Department's standing may properly be decided by the bankruptcy court.[7]

Based on the foregoing, it is ordered that the

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[7] The court would, however, make the following observations on the issue. First, to the extent that Magnolia relies on 11 U.S.C. § 1109 as the basis for its claim that the Department is not a party in interest and thus lacks standing, its reliance is not well placed, for

> Section 1109(b) of the Code does not appear to have any bearing on whether one qualifies as a party in interest who may bring an adversary action. The language of Section 1109(b) states that it applies to a case under title Il--i.e., to the underlying bankruptcy case. The applicable provision for ascertaining whether one is a party in interest in an adversary proceeding is Fed. R.Civ. P. 17(a).

Marcus Hook Dev. Park, Inc. v. Lampl, Sable & Makoroff, 153 B.R. 693, 700 (Bankr. W.D. Pa. 1993). See also Rules of Practice and Procedure in Bankruptcy Rule 7017 ("Rule 17 F.R.Civ. P. applies in adversary proceedings .... "). And to the extent that Magnolia's challenge to the Department's standing is based on its claim that Magnolia has no valid interest in the assets held by Prudential, its challenge appears to go directly to the merits of the Department's claim and is not properly resolved as a preliminary matter unless Magnolia demonstrates that there is no issue of fact as to the Department's interest. See Barrett Computer Services, Inc. v. PDA, Inc., 884 F.2d 214, 219 (5th Cir. 1989) (where considerations of standing cannot be severed from resolution of the merits, a preliminary hearing of the type available in disposing of a motion to dismiss "would not offer an appropriate forum for evaluating the issues").

No. 3:97CV513LN *In Re Magnolia Venture Capital Corporation*

Department's motion to dismiss on Eleventh Amendment grounds is denied, and this case is again referred to the bankruptcy court for final disposition.

SO ORDERED this 20th day of November, 1997.

/s/_____
UNITED STATES DISTRICT JUDGE